

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

LEON BROWN	:	
	:	
v.	:	Docket No. 1:01-CV-318
	:	
CITY OF SOUTH BURLINGTON	:	
and	:	
CHARLES HAFTER, Individually	:	
and as City Manager, City of	:	
South Burlington,	:	
MICHAEL O'NEIL, Individually	:	
and as Chief Engineer, City of	:	
South Burlington	:	
_____	:	

RULING ON PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION
(Paper 65)

BACKGROUND

In January 1999, Plaintiff Leon Brown ("Plaintiff") sent an anonymous letter to the South Burlington City Council, the Federal Bureau of Investigation ("FBI"), the Federal Emergency Management Agency ("FEMA"), and various media outlets alleging that Defendants committed a fraud upon FEMA in January 1998 by submitting false claims for meals. After Plaintiff was discovered to be the author of the letter, he was given the choice of resignation or termination. He chose to resign.

In conjunction with his resignation, Plaintiff signed a release of all claims in exchange for a payment of \$7,964.70. In January 2001, Plaintiff contacted Defendants seeking

additional compensation. Thereafter, Plaintiff filed this lawsuit on October 15, 2001. Plaintiff did not return the \$7,964.70 before filing suit.

Defendants moved for summary judgment arguing that the release signed by Plaintiff precluded suit. (Paper 27.) The Magistrate Judge held, inter alia, that the release did not preclude the action because Plaintiff raised genuine issues of fact whether the release was procured through fraud. (Paper 55.) Defendants filed a Motion for Reconsideration (Paper 56) which this Court construed as a timely objection to the Magistrate Judge's Report. In their objection, Defendants argued that Plaintiff's failure to tender back the consideration received in exchange for signing the release amounts to ratification of the release. Because the issue of ratification was not raised before the Magistrate Judge, this Court recommitted the matter for a determination whether the argument had been properly raised, its merits and its effect, if any, upon Plaintiff's remaining claims.

In the Magistrate Judge's Report and Recommendation (Paper 65) he held that the defense of ratification was properly raised and precluded Plaintiff's remaining claims since he failed to timely tender back the consideration. Plaintiff filed objections (Paper 66) which are now before the Court.

DISCUSSION

A district judge must make a de novo determination of any portion of the report and recommendation of a magistrate judge to which specific written objection has been made. See Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(C). The judge may then accept, reject, or modify, in whole or in part, the magistrate judge's proposed findings and recommendations. 28 U.S.C. § 636(b)(1)(C). The statutory obligation of a district court to arrive at its own independent conclusion about those portions of the magistrate judge's report to which objection is made is not satisfied by a mere review of the report itself, however persuasive and well-documented. Hernandez v. Estelle, 711 F.2d 619, 620 (5th Cir. 1983).

The Court has conducted a de novo review of the record, including, among other things, the Report and Recommendation, Plaintiff's Objections, and applicable legal authorities. For the reasons set forth in the Magistrate Judge's Report and discussed below, the Court adopts the Report and Recommendation in full. In doing so, however, the Court bases its decision primarily on the alternative grounds recommended in the Report. This approach is consistent with the Second Circuit's position on affirmative defenses first raised on summary judgment. When confronted with such a defense for the first time on summary judgment, the Second Circuit approves

construing the motion for summary judgment as a motion to amend the answer, adding the new defense prior to granting summary judgment. See Saks v. Franklin Covey Co., 316 F.3d 337, 350 (2d Cir. 2003); see also, Monahan v. New York City Dep't of Corrections, 214 F.3d 275, 283 (2d Cir. 2000).

Plaintiff's first objection addresses the timeliness of Defendant's ratification defense. As mentioned above, the Court agrees that allowing amendment at this stage is appropriate. Judge Neidermeier correctly analyzes the amendment issue under Fed. R. Civ. P. 15 and the factors enunciated in Foman v. Davis, 371 U.S. 178, 182 (1962). The Court agrees there was no undue delay or prejudice, and that the defense of ratification is not futile. In short, because Plaintiff was aware from the outset that Defendants believed the release provided a defense to all claims, he cannot claim prejudice by unfair surprise. Also, the ratification defense is not futile but is, in fact, dispositive.

In his second objection Plaintiff contends the release should be void as against public policy. Judge Neidermeier is correct, however, that releases to private claims under the False Claims Act ("FCA") are permitted. See United States ex rel. Summit v. Michael Baker Corp., 40 F. Supp. 2d 772, 776 (E.D. Va. 1999). In support of his public policy argument, Plaintiff cites United States ex rel. Green v. Northrop Corp.,

59 F.3d 953 (9th Cir. 1995). Northrop, however, prohibits pre-filing releases of qui tam claims because they would undermine the qui tam provisions of the FCA. Id. at 969. The qui tam provisions are not implicated in this private action, and Northrop is therefore inapplicable.

In his third objection Plaintiff contends Judge Neidermeier erroneously determined that any economic duress to Plaintiff was removed when he received a favorable settlement in a separate automobile accident claim. There is ample support in the record for Judge Neidermeier's conclusion: Plaintiff had secured other employment and received compensation for injuries in another lawsuit.

In his fourth objection Plaintiff contends there was no consideration for the release. This argument is without merit. The cash payment for accrued sick time constitutes consideration since the personnel policy of the Defendant City of South Burlington does not include payments for accrued sick time upon resignation. (Paper 60, Exhibit D at 26.) Furthermore, Plaintiff concedes he was not entitled to two weeks of severance pay. Judge Neidermeier correctly determined that payment of these sums constitutes consideration.

Plaintiff's fifth and final objection is that the defense of ratification is inapplicable because ordinary contract

principles should not apply to releases under the FCA. Plaintiff first contends his action is one for restitution. This argument ignores the fact that "a release is a contract" Investment Properties, Inc. v. Lyttle, 169 Vt. 487, 497 (1999), and as such contract principles apply. Plaintiff further argues the tender-back rule, which results in ratification, is not applicable to a private action under the FCA. Plaintiff equates the FCA with other federal anti-discrimination statutes (in particular, the ADEA) for which traditional contract principles, including the tender-back rule, are deemed inapplicable. Plaintiff, however, cites no authority for the proposition that ordinary contract principles do not apply in the FCA context. Plaintiff's reliance upon Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998), is misplaced for reasons thoroughly explained in the Magistrate Judge's Report (Paper 65, p. 12, note 3.)

Having concluded the tender back rule applies, Judge Neidermeier correctly determined that Plaintiff's attempts to tender back the consideration nearly two and one-half years later were untimely. See In re Boston Shipyard Corp., 886 F.2d 451, 455 (1st Cir. 1989) ("it is well-settled . . . that a contract or release, the execution of which is induced by duress, is voidable, not void, and the person claiming duress must act promptly to repudiate the contract or release or he

will be deemed to have waived his right to do so."); see also, Harless v. Research Institute of America, 1 F. Supp. 2d 235, 242 (S.D.N.Y. 1998).

CONCLUSION

The Court has reviewed the Magistrate's Report and Plaintiff's objections and has considered de novo those portions of the Report to which objections pertain. In accordance with the Magistrate's recommendation, the Defendants' Motion to Amend the Answer to Explicitly State the Defense of Ratification (Paper 62) is GRANTED, and Defendant's Motion for Summary Judgment on the Release of All Claims (Paper 27) is GRANTED.

SO ORDERED.

Dated at Brattleboro, Vermont this ____ day of September, 2003.

J. Garvan Murtha, U.S. District Judge